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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-335

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

v.

ROBERT LAFONTAINE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Railway Labor Conference respectfully moves for leave to file the attached brief *amicus curiae*. Petitioner consented to the filing of the brief, but respondent did not.

Almost all of the nation's Class I railroads are members of the National Railway Labor Conference. The Conference represents member railroads both in national collective bargaining pursuant to the Railway Labor Act with unions representing their employees and in regard to other labor-management relations problems that are of concern to the railroads generally.

The decision below interprets Section 3 First (j) of the Railway Labor Act (45 U.S.C. § 153 First (j)) in a man-

ner that is contrary to the overall scheme of that Act and to prior decisions by this Court and by other courts of appeals. If the decision is allowed to stand, it threatens to undermine the finality of arbitration awards disposing of the claims and grievances of railroad employees. The decision is therefore of great importance to the Conference and to each of its member railroads.

The Sixth Circuit's interpretation of Section 3 First (j) was previously before this Court in *Erie Lackawanna Railway Company* v. *L. F. Cole*, No. 76-900, certiorari denied, 433 U.S. 914 (1977) (reported below in 541 F.2d 528). In that case the Conference moved for and was granted leave to file a brief *amicus curiae* at the petition stage. By the attached brief herein the Conference wishes to apprise the Court of its continuing concern over what it views as an incorrect interpretation of Section 3 First (j), and to emphasize several of the more important considerations why the issue decided below should be passed upon by this Court.

For the foregoing reasons, the motion for leave to file the attached brief should be granted.

Respectfully submitted,

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BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

Petitioner seeks review of a decision of the Sixth Circuit that a railroad employee who has authorized his union to represent him in all adjustment board proceedings may challenge an adverse decision by an adjustment board convened under Section 3 Second of the Railway Labor Act on the ground that he himself did not receive notice of the adjustment board hearing, in which his authorized union representative participated fully on his behalf. The Seventh Circuit has held to the contrary, and the conflict warrants resolution by this Court.

1. The Sixth Circuit's decision in this case relied upon an earlier decision by the same court to the same effect in *Cole* v. *Erie Lackawanna Railway Co.*, 541 F.2d

528 (6th Cir. 1976), certiorari denied, 433 U.S. 914 (1977). The National Railway Labor Conference moved for and was granted leave to file a brief *amicus curiae* in support of the Erie Lackawanna's petition for a writ of certiorari in *Cole*. For the reasons set forth in that brief, to which we respectfully refer the Court, we believe that the decision in *Cole* is at odds both with the structure and purpose of the Railway Labor Act and with this Court's decisions in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711 (1945) (*Burley I*), and *id.*, 327 U.S. 661 (1946) (*Burley II*).

Moreover, at this Court's invitation the Solicitor General filed a brief *amicus curiae* in *Cole* expressing the views of the United States. That brief urged (at page 12) that the Sixth Circuit's interpretation of the Railway Labor Act is incorrect, that it "threatens the integrity of the arbitral process under the" Act, and that "this Court should not await the development of a conflict before resolving the question" whether the Sixth Circuit's view is correct.

2. Now there is a conflict among the circuits. In *O'Neill* v. *Public Law Board No. 550*, No. 77-1339, decided August 11, 1978 (Supplemental Brief of Petitioner, App. A1-A9), the United States Court of Appeals for the Seventh Circuit, after noting areas of agreement with the Sixth Circuit in *Cole*, stated (*id.* at A5-A6), "we hold in contrast to the Sixth Circuit that where an individual employee authorizes his union to represent him before [a special adjustment board] and to receive any notices on his behalf, Section 153 First (j) does not require that actual notice be given to the individual employee."* The unanimous panel in *O'Neill* fully appreciated that its view was not reconcilable with that of its sister circuit, for it circulated its opinion among all of the judges of the court in regular active service, and reported that "No judge favored a rehearing *en banc* on the conflict between the holding of this case and the holding of the Sixth Circuit in *Cole* * * *" (*id.* at A6, n. 5).

* In the case at bar, and in *O'Neill*, and in *Cole*, the employee was a member of the United Transportation Union, the constitution of which provides that, unless notified to the contrary by the employee, the union is given "complete authority" to handle a member's claim or grievance, including "authority to receive notice of hearings." Supplemental Brief of Petitioner, App. A6.

This Court should resolve the conflict. For the reasons stated more fully in the briefs *amici curiae* in *Cole*, the interpretation by the Sixth Circuit of the Railway Labor Act is incorrect and stands to create grave uncertainty in the dispute-resolving procedures of that Act. That uncertainty has now been compounded by the conflicting Seventh Circuit decision in *O'Neill*. The issue is of great and continuing concern to both carriers and labor organizations subject to the Act, and should be determined by this Court.

Respectfully submitted,

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